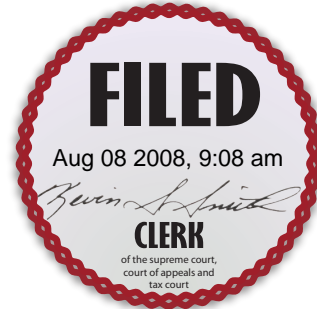


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court [e]xcept for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

STEPHEN H. RABE
Richmond, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

MICHAEL GENE WORDEN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

RODNEY G. POLLARD,
Appellant-Defendant,

vs.

STATE OF INDIANA,
Appellee-Plaintiff.

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No. 81A05-0802-CR-96

APPEAL FROM THE UNION CIRCUIT COURT
The Honorable Matthew Cox, Judge
Cause No. 81C01-0701-FB-20

August 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Rodney Pollard appeals his sentence for criminal confinement as a class D felony.¹ Pollard raises one issue, which we revise and restate as whether the trial court abused its discretion by sentencing Pollard for a class D felony rather than a class A misdemeanor. We affirm.

The relevant facts follow. On November 17, 2006, Pollard confined his then fifteen-year-old daughter, S.A.P., in a semi truck sleeper without S.A.P.'s consent. Pollard touched S.A.P. in a rude, insolent, or angry manner, which resulted in bodily injury to S.A.P.

The State charged Pollard with sexual misconduct with a minor as a class B felony and two counts of sexual misconduct with a minor as class C felonies. The State filed amended charges of criminal confinement as a class D felony and battery as a class A misdemeanor. Pollard pled guilty to the amended charges. The plea agreement stated that Pollard “shall have the opportunity to request that the court impose sentence as a class A Misdemeanor, and to request that the court allow him to continue his work as a truck driver.” Appellant’s Appendix at 36.

At the sentencing hearing, Pollard testified that he is a truck driver and that he would be unable to pursue his employment if he was sentenced to a class D felony. Pollard also presented evidence that he worked as a jail trustee and was a “model inmate” and “exemplary trustee.” Transcript at 19-21.

The trial court declined to enter the class D felony conviction as a class A misdemeanor conviction because the victim was Pollard’s daughter. The trial court

¹ Ind. Code § 35-42-3-3 (Supp. 2006).

sentenced Pollard to 720 days in the Department of Correction for criminal confinement as a class D felony and one year for battery as a class A misdemeanor. The trial court ordered that the sentences be served concurrently. The trial court found “that [Pollard] has spent 360 actual days in confinement awaiting the disposition of this cause, therefore, [Pollard]’s time has been served.” Appellant’s Appendix at 41.

The sole issue is whether the trial court abused its discretion by sentencing Pollard for a class D felony rather than a class A misdemeanor on the conviction for criminal confinement. Prior to addressing the issue raised by Pollard, we must first address the State’s argument that this issue is moot because Pollard was sentenced only to time served.

The long-standing rule in Indiana courts has been that a case is deemed moot when no effective relief can be rendered to the parties before the court. Hamed v. State, 852 N.E.2d 619, 621 (Ind. Ct. App. 2006) (citing Matter of Lawrance, 579 N.E.2d 32, 37 (Ind. 1991)). When the concrete controversy at issue in a case has been ended or settled, or in some manner disposed of, so as to render it unnecessary to decide the question involved, the case will be dismissed. Id. at 621-622. However, an appeal may be heard which might otherwise be dismissed as moot where leaving the judgment undisturbed might lead to negative collateral consequences. Id. at 622 (citing Roark v. Roark, 551 N.E.2d 865, 867 (Ind. Ct. App. 1990)).

The United States Supreme Court has noted that a criminal conviction remains a live controversy, even after the sentence is served, because it often leads to collateral consequences. Sibron v. New York, 392 U.S. 40, 50-58, 88 S.Ct. 1889, 1896-1900

(1968). The Court noted that “it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequence of the disability itself for an indefinite period of time.” Id. at 57, 88 S.Ct. at 1899. Pollard’s conviction as a class D felony, though his sentence has been served, will have collateral consequences and this case is, therefore, not moot.² See Kirby v. State, 822 N.E.2d 1097, 1101 n.4 (Ind. Ct. App. 2005) (holding that “the mere fact that [appellant] has served his aggregate two- to five-year sentence on the convictions at issue does not render his claim regarding the validity of such convictions moot” and that “[appellant]’s criminal convictions have collateral consequences inasmuch as they have or may form the basis of a habitual offender enhancement”), trans. denied; Rader v. State, 181 Ind. App. 546, 548, 393 N.E.2d 199, 201 (1979) (noting that the defendant’s case had not become moot simply because his sentence had been served). Thus, we will address the merits of Pollard’s argument.

Pollard argues that the trial court abused its discretion by not entering his conviction for criminal confinement as a class A misdemeanor. (**Appellant’s Brief at 4**)

² The State cites Lee v. State, 816 N.E.2d 35, 40 n.2 (Ind. 2004), and Albaugh v. State, 721 N.E.2d 1233, 1234 n.3 (Ind. 1999), in support of its argument that this issue is moot. We find these cases distinguishable. In Lee, the Indiana Supreme Court held that “[u]nder some circumstances, the appropriate remedy to address an illegal sentence like the one here is to sever the illegal sentencing provision from the plea agreement, and remand the cause to the trial court with instructions to enter an order running the sentences concurrently.” 816 N.E.2d at 40. The Court held that the defendant was not entitled to such relief and noted that “[e]ven if Lee were so entitled, it would be of no benefit. He has already served his sentence. Once ‘sentence has been served, the issue of the validity of the sentence is rendered moot.’” Id. at 40, 40 n.2 (quoting Irwin v. State, 744 N.E.2d 565, 568 (Ind. Ct. App. 2001)). In Albaugh, the defendant filed a motion to stay the execution of his sentence. 721 N.E.2d at 1234. On appeal, the defendant challenged the trial court’s denial of his motion to stay the execution; however, he conceded, and the Indiana Supreme Court agreed, that the issue was moot because he had already completed his sentence. 721 N.E.2d at 1234 n.3. Here, Pollard’s argument is not focused on the length of his sentence but on the effect of being a convicted felon.

We review the sentence for an abuse of discretion. Anglemyer v. State, 868 N.E.2d 482, 490 (Ind. 2007), clarified on reh’g, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if “the decision is clearly against the logic and effect of the facts and circumstances.” Id. A trial court abuses its discretion if it: (1) fails “to enter a sentencing statement at all;” (2) enters “a sentencing statement that explains reasons for imposing a sentence—including a finding of aggravating and mitigating factors if any - but the record does not support the reasons;” (3) enters a sentencing statement that “omits reasons that are clearly supported by the record and advanced for consideration;” or (4) considers reasons that “are improper as a matter of law.” Id. at 490-491. If the trial court has abused its discretion, we will remand for resentencing “if we cannot say with confidence that the trial court would have imposed the same sentence had it properly considered reasons that enjoy support in the record.” Id. at 491. However, under the new statutory scheme, the relative weight or value assignable to reasons properly found, or those which should have been found, is not subject to review for abuse of discretion. Id.

Pollard argues that the trial court failed to consider arguments and testimony regarding the adverse impact a felony conviction would have on his career and the fact that he “had been an exemplary trustee while at the jail.” Appellant’s Brief at 5. Pollard also points out that S.A.P. “failed to make any statement to the Court, through the guardian Ad Litem or otherwise.” Id.

A conviction for criminal confinement is presumptively a class D felony. See Ind. Code § 35-42-3-3.³ Ind. Code § 35-50-2-7 provides, in relevant part, that “if a person has committed a Class D felony, the court may enter judgment of conviction of a Class A misdemeanor and sentence accordingly.”

At sentencing, the trial court stated:

Just by looking at the case, the Court has in front of it a Class D Felony conviction with no criminal history. The law provides that the Court can enter a Class A Misdemeanor for a first time D Felony conviction, with a lack of criminal history. At first glance, that . . . first glance the Court has done that in the past, and it is not uncommon for Courts to do that, however, I have in front of me also a guilty plea and conviction to criminal confinement where the victim was your daughter. I

³ Ind. Code § 35-42-3-3 provides:

- (a) A person who knowingly or intentionally:
 - (1) confines another person without the other person’s consent; or
 - (2) removes another person, by fraud, enticement, force, or threat of force, from one (1) place to another;commits criminal confinement. Except as provided in subsection (b), the offense of criminal confinement is a Class D felony.
- (b) The offense of criminal confinement defined in subsection (a) is:
 - (1) a Class C felony if:
 - (A) the person confined or removed is less than fourteen (14) years of age and is not the confining or removing person’s child;
 - (B) it is committed by using a vehicle; or
 - (C) it results in bodily injury to a person other than the confining or removing person; and
 - (2) a Class B felony if it:
 - (A) is committed while armed with a deadly weapon;
 - (B) results in serious bodily injury to a person other than the confining or removing person; or
 - (C) is committed on an aircraft.

also have a guilty plea and conviction to battery, where the victim was your daughter.

* * * * *

The fact that [S.A.P.]’s not here today, I could say, I agree with you[, Pollard’s attorney]. She could have come in here and asked for something different. She could have also . . . not be here because she may be afraid of him. I don’t know. The fact that we appointed a guardian ad litem to take care of her, represent her, do whatever she does in these proceedings, says that there was something there, some fear, some anticipation, that we needed a trained professional to take care of her, whether it was a deposition or any Court proceedings. The fact that the victim was your daughter in this case, Mr. Pollard, just presents a different set of circumstances. I am going to sentence you to time served. Let you get on your way to face the other charges in Ohio, but the Court declines to enter judgment as a Class A Misdemeanor. Mr. Pollard, you have been a model citizen for a year. I thank you for that. The Sheriff thanks you for that. But I cannot get past the fact that the victim in this case was your daughter. And that’s the reason why I’m not entering a Class A Misdemeanor. You’re a hard worker, you do what you’re told, but the fact is, I’ve got a victim here, and it’s my job to do what’s right, and this is what I feel is right.

Transcript at 32-33. Based on the trial court’s comments, we cannot say that the trial court ignored the impact a felony conviction would have on Pollard’s career, the fact that Pollard had been an exemplary jail trustee, or S.A.P.’s lack of a statement. Rather, the trial court focused on the fact that S.A.P. was Pollard’s daughter. We cannot say that the trial court abused its discretion by sentencing Pollard as a felon. See, e.g., Taylor v. State, 511 N.E.2d 1036, 1040-1041 (Ind. 1987) (holding that the trial court did not abuse its discretion when it sentenced the defendant as a felon).

For the foregoing reasons, we affirm Pollard’s conviction and sentence for criminal confinement as a class D felony.

Affirmed.

BAKER, C. J. and MATHIAS, J. concur